

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 DARREL STEWART,

10 Plaintiff,

11 v.

12 HENRY RICHARDS, *et al.*,

13 Defendants.

Case No. C08-5275 RJB/KLS

REPORT AND
RECOMMENDATION

**NOTED FOR:
October 17, 2008**

14 Before the Court is the motion for summary judgment of Defendants Henry Richards and
15 Diana Crawford (Dkt. # 15). Defendants' motion is supported with the Declaration of Cathi D. Harris
16 and attached exhibits.¹ Plaintiff filed his opposition and declaration in support. (Dkts. # 18 and 19).
17 Defendants filed their reply and the Declaration of John Rockwell. (Dkt. # 22; Dkt. # 22-2)².

18 After careful review of the motions, supporting declarations and documents, and viewing the
19 facts in the light most favorable to the Plaintiff, the undersigned finds that Defendants' motion should
20 be granted and Plaintiff's complaint dismissed with prejudice.

21 **I. SUMMARY OF CLAIMS AND RELIEF REQUESTED**

22 Plaintiff Darrel Stewart is 63 years old and is a civilly committed sexually violent predator.
23 (Dkt. # 16-4, ¶¶ 3, 6; pp. 1-2). He resides at the Special Commitment Center (SCC), a Washington
24

25 ¹For ease of reference, citations are to CM-ECF pagination. Defendants' exhibits may be
26 found at Dkt. # 62-2, pp. 1-5; Dkt. # 16-3, pp. 1-33; Dkt. # 16-4, pp. 1-2; Dkt. # 16-5, pp. 1-7.

27 ²By separate motion, Defendants requested a stay of discovery pending resolution of their
28 motion for summary judgment. (Dkt. # 17). By separate order, this Court granted that motion.

1 Department of Social and Health Services (DSHS) facility for the care and treatment of sexually
2 violent predators pursuant to Wash. Rev. Code ch. 71.09, Washington's sexually violent predator
3 statute. *Id.*, ¶ 5. Mr. Stewart declines to participate in sex offender specific treatment at SCC. *Id.*,
4 ¶6.

5
6 In this 42 U.S.C. § 1983 action, Mr. Stewart alleges that Defendants violated his First
7 Amendment rights when Mr. Stewart's treatment team denied his request to purchase certain books
8 containing "youthful characters" and "juvenile themes" by someone with his criminal history. (Dkt. #
9 1, p. 3). Mr. Stewart seeks a declaratory judgment that SCC Policy 208IX(C)³ is unconstitutionally
10 vague on its face and/or as applied to himself and the residents of SCC, and also requests punitive
11 damages.

12
13 Defendants request dismissal of Mr. Stewart's claims based on this Court's previous holding
14 in *Spicer v. Richards*, C07-5109FDB/KLS. In that case, the court held that no constitutional right
15 exists within a total confinement facility for sexually violent predators to possess counter-therapeutic
16 media.⁴

17 II. FACTS

18 A. Plaintiff's History of Sexually Violent Offenses

19
20 Plaintiff does not dispute that he was committed to SCC as a sexually violent predator after
21 a jury trial, pursuant to Wash. Rev. Code ch. 71.09. (Dkt. # 18, p. 2). A complete recount of Mr.

22
23 ³Mr. Stewart's reference to paragraph IX(C) is in error. The paragraph containing the
24 allegedly unconstitutionally vague language of which he complains is contained in paragraph
25 VII(C) of SCC Policy 208. (Compare Dkt. # 2, p. 10, in which Plaintiff references the language of
26 paragraph VII(C) and Dkt. # 16-5, p. 4 - Policy 208, Effective March 18, 1992, Re-issued June 12,
2007).

27 ⁴See Report & Recommendation for entry of partial summary judgment in Case No. C07-
28 5109FDB/KLS (Dkt. # 24) and Order Adopting R&R (Dkt. # 27).

1 Stewart's history of sexually violent offenses are detailed in Defendants' motion and will not be
2 repeated here. (Dkt. # 15, pp. 2-4). Mr. Stewart does not dispute that he has a history of sexually
3 violent and motivated crimes. (Dkt. # 18, p. 2). He disputes only that he was convicted of a 1972
4 arrest for sexually assaulting a young lady in a theater in Nebraska. *Id.*

5 Mr. Stewart declines to participate in the sex offender treatment at the SCC. (Dkt. # 18, p.
6 1).
7

8 **B. Reading Materials and Visual Media**

9 To maintain a treatment oriented environment, the SCC limits residents' access to certain
10 media. (Dkt. # 16; 16-5, pp. 1-7 (SCC Policy No. 208, Sexually Explicit and Related Material)).
11 Pursuant to Paragraph VII(C), governing "Books, Posters and Other Material," if the content of a
12 "book, piece of graphic art, or other item is determined to be linked to the resident's criminal
13 history, the item shall be prohibited to the resident."
14

15 The specific media a particular resident may not possess is based on his treatment team's
16 professional judgment of the negative effect of such media on the specific resident and his sexually
17 violent offense history. For example, a resident with a history of offending against children may not
18 be allowed to possess media with juvenile themes characteristic or representative of the resident's
19 victim range/profile(s). *Id.*, p.2, § I (B). A resident with a history of violent rape against women
20 may not be allowed to possess sexually explicit depictions of women or depictions of sexual
21 violence. *Id.*
22

23 Mr. Stewart's forensic therapist (FT) reviews reading materials and visual media he wishes
24 to possess at the SCC to determine whether, in the exercise of her professional judgment, the
25 materials are appropriate for Mr. Stewart to possess. (Dkt. # 16, p. 2, ¶ 7). If the FT determines the
26 materials are inappropriate, Mr. Stewart's treatment team then reviews the FT's determination. On
27

1 the basis of the team members' collective professional judgment, they either approve or disapprove
2 the FT's decision. *Id.* In this case, Mr. Stewart's treatment team has declined to authorize him to
3 possess certain media with juvenile themes and law enforcement crime solving techniques and
4 psychology in view of his extensive history of sexual offenses, including offending against 6- and
5 13-year-old girls. *Id.*

7 Members of a treatment team include Forensic Therapists (FT), a Forensic Therapist
8 Supervisor, Psychology Associates, as well as Residential Rehabilitation Counselors (RRCs), and
9 RRC Supervisors, a Program Area Manager and Residential Area Manager. The FTs, FT
10 Supervisor, and Psychology Associates all have educations at the Bachelor's level or above, with
11 the majority having Master's Degrees in psychology or a similar field. (Dkt. # 22, p. 2). Defendant
12 Crawford's training and education for the FT position include an Associates Degree in Arts and
13 Science, a B.A. in Criminal Justice, and an M.A. in Psychology. *Id.* She has worked with the
14 mental health population within a correctional setting for approximately six years. *Id.* As a
15 requirement for her Master's degree, Ms. Crawford completed a practicum of 160 hours working
16 with veterans. This background is consistent with the education, training and skills expected of a
17 forensic therapist who is tasked with exercising professional judgment within the SCC program. *Id.*, p.
18 2-3.

21 Mr. Stewart was denied access to three books, The Bartimaeus Trilogy, Escape from Earth
22 and Alien Crimes. (Dkt. # 2, p. 6). Mr. Stewart's FT and treatment team concluded that these
23 books were inappropriate for Mr. Stewart to possess based on his diagnoses and sexually violent
24 offense history. (Dkt. # 16, pp. 3-4; Dkt. # 22, p. 2). The team concluded that the first two books
25 were inappropriate because they were written for "young adults," i.e., youths with a reading level of
26 ages 9-12 and the youth of the characters and juvenile themes. *Id.* The third book was found to be

1 inappropriate as it focused on the tools and psychology of law enforcement “police procedurals”
2 which can be used by residents to avoid consequences for antisocial behavior. *Id.*

3 4 **III. STANDARD OF REVIEW**

5 Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that
6 there is no genuine issue as to any material fact and that the moving party is entitled to judgment as
7 a matter of law. Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 56(c). In deciding whether
8 summary judgment should be granted, the court must view the record in the light most favorable to
9 the nonmoving party and indulge all inferences favorable to that party. Fed. R. Civ. P. 56(c) and (e).
10 When a summary judgment motion is supported as provided in Fed. R. Civ. P. 56, an adverse party
11 may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or
12 as otherwise provided in Fed. R. Civ. P. 56, must set forth specific facts showing there is a genuine
13 issue for trial. Fed. R. Civ. P. 56(e). If the nonmoving party does not so respond, summary
14 judgment, if appropriate, shall be rendered against that party. *Id.*

15
16 The moving party must demonstrate the absence of a genuine issue of fact for trial.
17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Mere disagreement or the bald assertion
18 that a genuine issue of material fact exists does not preclude summary judgment. *California*
19 *Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.
20 1987). A “material” fact is one which is “relevant to an element of a claim or defense and whose
21 existence might affect the outcome of the suit,” and the materiality of which is “determined by the
22 substantive law governing the claim.” *T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors*
23 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

24 25 **IV. DISCUSSION**

26 In the civil commitment setting, a patient's liberty interests are balanced against the relevant
27

1 state interests to determine whether the state has violated the patient's constitutional rights.
2 *Youngberg v. Romeo*, 457 U.S. 307, 318 (1982). The law generally requires a careful balancing of
3 the rights of individuals who are detained for treatment, not punishment, against the state's interests
4 in institutional security and the safety of those housed at the facility. See also, *Hydrick v. Hunter*,
5 500 F.3d 978, 990 (9th Cir. 2007) (citing *Youngberg*, 457 U.S. at 319-22):
6

7 In weighing those interests, it cannot be ignored that, unlike the plaintiff in
8 *Youngberg*, who was civilly committed because of mental infirmities, SVPs have
9 been civilly committed subsequent to criminal convictions and have been adjudged
to pose a danger to the health and safety of others. Therefore, the rights of SVPs
may not necessary be coextensive with those of all other civilly detained persons.

10 *Hydrick*, 500 F.3d at 990.

11 Challenges to prison restrictions that are asserted to inhibit First Amendment interests must
12 be analyzed in terms of the legitimate policies and goals of the corrections system. *Pell v.*
13 *Procunier*, 417 U.S. 817 (1974). Similarly, First Amendment challenges of SCC policies must be
14 analyzed in terms of the legitimate policies and goals of SCC's treatment program. Decisions made
15 by professionals are presumptively valid; liability may only be imposed when the decision is such a
16 substantial departure from accepted professional judgment, practice, or standards as to demonstrate
17 that the person responsible actually did not base the decision on such a judgment. *Id.*, p. 323. The
18 Constitutional requires only that the courts make certain that professional judgment in fact was
19 exercised. It is not appropriate for the courts to specify which of several professionally acceptable
20 choices should have been made." *Youngberg*, 457 U.S. at 321. Mere disagreement without expert
21 testimony to show that defendants did not exercise professional judgment at all is insufficient to
22 avoid summary judgment dismissal. *Id.* at 322-23.
23
24

25 The undisputed evidence reflects that the SCC is a total confinement treatment facility
26 designed for persons whom a state court has committed or found probable cause to detain as
27

1 sexually violent predators under section 71.09.020(13). "(I)t is irrefutable that the State has a
2 compelling interest both in treating sex predators and protecting society from their actions." *In re*
3 *Young*, 122 Wash.2d 1, 26, 857 P.2d 989, 1000 (1993). "The treatment needs of (the SVP)
4 population are very long term, and the treatment modalities for this population are very different
5 than the traditional treatment modalities for people appropriate for commitment under the
6 involuntary treatment act." See WASH.REV. CODE 71.09.010.

8 Defendants argue that no constitutional right exists to possess therapeutically inappropriate
9 media within a total confinement treatment facility for persons detained or committed as sexually
10 violent predators. (Dkt. # 15, p. 6). Absent a constitutional right, Mr. Stewart's claim fails as a
11 matter of law. *Id* Plaintiff argues, however, that Defendants acted arbitrarily and capriciously in
12 exercising their professional judgment when they rejected his request for the books (Dkt. # 18, p. 3)
13 and that books and "youthful characters" and "juvenile themes" are available through SCC's library
14 and televisions located in residents' units. (*Id.*, p. 4). Mr. Stewart also argues that there is no
15 evidence linking the books with criminal behavior. (*Id.*, pp. 4-5). He argues that if Defendants are
16 allowed to ban printed items based on the characters and/or themes within the stories, they should
17 have to prove beyond a reasonable doubt with direct evidence that this type of printed material had
18 caused residents to commit crimes in the past and that they would cause him to act out in a criminal
19 manner in the future. *Id.*; *See also*, Dkt. # 2, pp. 14-15. Mr. Stewart also argues that there is no
20 evidence that Defendant Crawford is a qualified member of the treatment team. *Id.*, p. 6.

23 This Court has previously held that no constitutional right exists for sexually violent
24 predators to possess counter-therapeutic media within a total confinement treatment facility. *See*
25 *Spicer v. Richards*, C07-5109 FDB/KLS, Dkt. # 48. In that case, the plaintiff alleged that his
26 freedom of speech was violated because his treatment team was restricted his access to books,
27

1 magazines and movies, even though he was not in treatment. (*See* Dkt. # 6, ¶ 8 therein). The
2 plaintiff in that case also argued that different standards should apply to persons who are not in
3 treatment and that Policy 208 cannot be applied equally to the written materials received by SCC
4 residents and DVD movies or television shows that residents may view. *Id.* Mr. Stewart argues that
5 because he is not in treatment, his claim should be treated differently under the First Amendment.
6 (Dkt. # 18, p. 3). He also argues that SCC’s Policy 208 cannot be applied equally to materials with
7 inappropriate themes that SCC residents may receive, obtain at the library or view on the televisions in
8 their units. (Dkt. # 18, p. 4).

10 The Court previously rejected the argument that similar materials may be elsewhere
11 obtained, stating that “this does not lead to the conclusion that the policy is not rationally related to
12 the state's legitimate interest in maintaining institutional security and a therapeutic treatment
13 environment.” (Dkt. # 24, p. 12; *See also*, Dkt. # 27 (Order Adopting R&R) in Case No. 7-
14 5109FDB/KLS). There, as in this case, the state’s interest in providing comprehensive treatment to
15 sexually violent predators outweighs Plaintiff’s interest in viewing counter-therapeutic material
16 which could interfere with the state-mandated treatment program or which could ultimately
17 endanger the public, SCC residents and staff. Thus, it matters not whether Plaintiff is personally
18 involved in treatment.

21 Mr. Stewart also objects to the qualifications of his treatment team. In particular, Mr. Stewart
22 argues that Defendant Crawford did not exercise her objective, professional judgment and that
23 Defendants have failed to provide any proof that she had the “professional, educational expertise,
24 training, and experience to make mental health professional judgments.” (Dkt. # 18, p. 6).

25 According to the SCC Forensic Therapist Supervisor, however, Defendant Crawford possesses
26 the requisite education, training and experience to perform the tasks of the position she holds at the
27

1 SCC. (Dkt. # 22, pp. 2-3).

2 Viewing all the evidence in the light most favorable to Mr. Stewart, the undersigned
3 concludes that there is no issue of fact regarding Mr. Stewart's claim that enforcement of SCC's
4 Policy 208 violates his First Amendment rights. Mr. Stewart has failed to show that SCC's Policy
5 208 is not rationally related to SCC's legitimate interest in maintaining institutional security and a
6 therapeutic treatment environment. Although Mr. Stewart clearly disagrees with the conclusions
7 reached by his therapeutic team, mere disagreement alone is insufficient to avoid summary
8 judgment dismissal.
9

10 V. CONCLUSION

11 For the reasons stated above the Court should **GRANT** Defendants' motion for summary
12 judgment (Dkt. # 15). A proposed order accompanies this Report and Recommendation. Pursuant to
13 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have
14 ten (10) days from service of this Report and Recommendation to file written objections. *See also*
15 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes
16 of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule
17 72(b), the Clerk of the Court is directed to set the matter for consideration on **October 17, 2008**, as
18 noted in the caption.
19

20 DATED this 25th day of September, 2008.
21

22
23 
24 Karen L. Strombom
25 United States Magistrate Judge
26
27
28